



Signed and Filed: January 31, 2022

Dennis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re) Bankruptcy Case No. 20-30711-DM
MARK E. MOON,)
) Chapter 11
)
)
Debtor.)
-----)
E. MARK MOON and LORI MOON,) Adversary Case No. 20-03117-DM
)
Plaintiffs,)
)
v.)
)
MILESTONE FINANCIAL, LLC, et)
al.,)
)
Defendants.)
-----)

MEMORANDUM DECISION REGARDING
CROSS-MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

The following decision deals with the complex world of California's usury law and its piecemeal exemptions. Incongruous as a result may be, ". . . we must take the usury law as we find it. Indeed, the usury law is complex and is riddled with so many exceptions that the law's application

1 itself seems to be the exception rather than the rule." *Ghirardo*
2 v. *Antonioli*, 8 Cal.4th 791, 807 (Cal. 1994) ("Ghirardo").
3 This appears to be both a case of first impression and one of
4 the rare instances in which application of usury law must apply
5 with no applicable exemptions.

6 **II. THE LOAN AND EXTENSION**

7 On June 23, 2015, Plaintiffs Mark E. Moon and Lori Moon
8 ("Moons" or "Plaintiffs") entered into a hard money loan
9 agreement (the "Original Loan") with Defendant Milestone
10 Financial, LLC ("Milestone") secured by the Moons' residence.
11 At that time, Milestone did not have either a real estate broker
12 license or a mortgage loan originator license and had been
13 warned by the State of California about its lack of appropriate
14 licenses.¹ The Moons were represented by licensed real estate
15 broker Marc Fournier.

16 One of the loan documents signed by the Moons was a
17 certification that the loan was a business or investment purpose
18 loan, meaning the protection found in the Truth in Lending Act
19 or other California laws meant to protect residential home loan
20 borrowers would not apply.² The Original Loan was for \$759,000

21

22 ¹ In March and April of 2015, the California Department of Real
23 Estate issued Cease and Desist Orders to Milestone and related
24 parties. These Orders demanded in part that Milestone "desist
25 and refrain from soliciting borrowers and/or performing services
for borrowers or lenders in connection with loans secured
directly or collaterally on real property" until such licenses
were obtained. See Plaintiffs' RJD, Dkt. 40.

26

27 ² Milestone makes much of the Moons' alleged misstatement of the
purpose of the loans, and Moons make much of Milestone's alleged
last-minute insertion of documents to make a residential loan

1 with an interest rate of 11.3%, a default interest rate of 17.3%
2 plus late fees, and interest-only payments of over \$7,000 per
3 month until the balance came due in July 2017.

4 The Moons signed the Promissory Note. (Dkt. 1-26).
5 Paragraph 2, titled "Payments," makes clear that the Original
6 Loan is payable in full on the Maturity Date, and will include
7 the entire principal, unpaid interest, and any other costs at
8 that time.³ Paragraph 4(a), titled "Late Charges; Default Rate"
9 states that should the Moons fail to make a monthly payment
10 within 10 days of the due date, a late charge (the "Late
11 Charge") equal to 10% of the monthly payment will be assessed as
12 a late charge, and "**it is extremely difficult and impractical to
ascertain the extent of such damages and that the Late Charge
represents a fair and reasonable estimate, considering all of
the circumstances on the date of the Execution of this Note, of
the costs the Holder will incur by reason of such late payment**"
13 (emphasis added).
14

15 Paragraph 4(b) reiterates the difficulty of ascertaining
16 the damages associated with the loss of timely payments as the
17 reason for the default interest rate set by the Promissory Note.
18

19 appear to be a business loan on paper. Ultimately, the dispute
20 over which party misled the other regarding the purpose of the
21 loan is a matter waived by terms of the Extension.

22
23
24 ³ Paragraph 2(a) says, in part: "The entire unpaid Principal
25 Balance, plus accrued interest and other amounts payable under
26 the Loan Documents, shall be due and payable in full on the
27 Maturity Date." Paragraph 2(c) says, in part: "**THIS LOAN IS
PAYABLE IN FULL ON THE MATURITY DATE SET FORTH HEREIN.**"
28 (Emphasis in original).

29 It goes on to state that a substantial
portion of the original principal sum will be due at maturity
"IN THE FORM OF A BALLOON PAYMENT" (emphasis in original).

1 Nowhere in Paragraph 4 is there any language regarding a late
2 charge on the balloon payment itself.

3 Paragraph 14, titled "Usury", contains a usury savings
4 clause that limits the interest charged to the applicable
5 statutory rate in the event that a court holds the amount of
6 interest charged "is in excess of applicable law."

7 The Moons began to struggle with payments almost
8 immediately. At some points, Milestone advanced the taxes and
9 insurance on the residence. About one year after the making of
10 the Original Loan, on August 26, 2016, the Moons and Milestone
11 entered into an agreement titled "Settlement Agreement,
12 Indemnity, and First Amendment to Promissory Note Secured by
13 Deed of Trust" (the "Extension") (Dkt. 1-27, 28)⁴. The Extension
14 supplemented and amended the Original Loan. It did not replace
15 it.

16 Milestone still did not have its own real estate broker or
17 loan originator license, and this time the Moons were not
18 represented by Mr. Fournier or any licensed real estate broker
19 in the making of the Extension. The Extension states that the
20 unpaid principal balance of the loan is \$902,525.34 in no fewer
21 than three parts of the document. The Extension extended the
22 Maturity Date of the loan to July 2019, slightly lowered the
23 initial interest rate to 11.05% and increased the monthly
24

25
26 ⁴ At that time there was no real dispute between the parties, so
27 it is unclear why Milestone chose to call the agreement a
28 "Settlement". Perhaps calling it the "Forbearance" that it was
invites invocation of the usury law that ultimately doomed its
strategy.

1 payments and default interest rate. Paragraph 8 of the
2 Extension, titled "Late Charges," stated:

3 Should any payment due hereunder not be
4 received on or before the TENTH (10th) day
5 after its due date (the 'Grace Period'),
6 Borrower shall immediately pay to Lender,
7 without notice or demand by Lender, a late
8 charge calculated at TEN PERCENT (10.00%) of
9 any payment then due, including the final
10 (balloon) payment."

11 Dkt. 1-28, p. 2 (emphasis in original).

12 The charge on the final balloon payment was a new addition
13 to the Extension, not part of the Original Loan. Within the
14 same paragraph, the basis for these late charges was made clear:

15 Borrower agrees that Lender will incur
16 administrative costs and other damages not
17 compensated by payment of interest as a result
18 of any payment not being made when due and
19 acknowledges that calculation of actual
20 damages is extremely difficult and
21 impracticable and that the foregoing amount is
22 a reasonable estimate of those damages.

23 After executing the Extension, the Moons promptly began
24 missing loan payments, though some payments were tendered at
25 various times.

26 In March 2019, the Moons sought to refinance their
27 residence with a different lender and requested a payoff amount
28 from Milestone. Milestone provided a payoff quote of

1 \$1,288,792.28, which included what was initially called a
2 "prepayment penalty" of \$115,615.06. In later filings Milestone
3 notes the phrase "prepayment penalty" was in error, and the
4 amount represents a late charge on the principal balance in
5 accordance with the Extension. The payoff was much higher than
6 what the Moons had anticipated, and they were ultimately unable
7 to refinance the loan.

8 **III. PROCEDURAL HISTORY**

9 On November 18, 2019, the Moons filed a complaint in San
10 Mateo superior court against Milestone, William R. Stuart
11 ("William Stuart"); Bear Bruin Ventures, Inc. ("Bear Bruin");
12 and Evergreen Escrow, Inc. ("Evergreen") (collectively,
13 "Defendants"). On February 14, 2020, the Moons filed an Amended
14 Complaint against the same Defendants. The Amended Complaint
15 seeks damages against the Defendants on four counts of alleged
16 wrongdoing:

17 1. Declaratory Relief to determine the rights and
18 obligations of the Moons under the Extension;
19 2. Breach of Contract against Milestone;
20 3. Fraud against Stuart, Milestone, and Bear Bruin;
21 4. Intentional Interference with a Contract by
22 Milestone and Evergreen.

23 While the lawsuit was pending, Milestone began foreclosure
24 proceedings. After originally issuing a temporary restraining
25 order, the state court eventually denied the Moons' Motion for
26 Preliminary Injunction on September 4, 2020. On September 10,
27 2020, the Moons filed a Notice of Appeal but on the same day,
28 Mark E. Moon filed a bankruptcy petition. On October 16, 2020,

1 the Moons removed the Amended Complaint to this court via this
2 adversary proceeding. Evergreen was voluntarily dismissed on
3 August 12, 2021.

4 After rounds of discovery disputes and an attempt at
5 settlement via the Bankruptcy Dispute Resolution Program, the
6 Moons filed a Motion for Partial Summary Judgment on September
7 9, 2021 (Dkt. 36) ("Moon MPSJ") and Defendants filed a Motion
8 for Summary Judgment on September 16, 2021 (Dkt. 43) ("Defendant
9 MSJ").

10 The Defendant MSJ seeks summary judgment on each of the
11 four counts of the Amended Complaint. Anomalously, the Moon
12 MPSJ does not seek partial summary judgment on the four
13 enumerated claims of the Amended Complaint but seeks judgment on
14 three claims not found in the Amended Complaint:

- 15 1. The Extension violated usury law⁵;
- 16 2. Milestone demanded an illegal acceleration
17 penalty from the Moons;
- 18 3. Milestone illegally charged multiple late fees on
19 a single loan payment.

20 The Moons also belatedly presented a new theory of
21 interference with an economic advantage (Dkt. 49).

22

23 ⁵As noted above, the Moons did not raise the matter either as a
24 claim or defense until the Moon MPSJ. While the Court
25 recognizes that the Moons would not have been able to obtain
26 relief by default on the usury claim in the Moon MPSJ because it
27 was not initially plead as a claim, or part of a defense, all
28 parties have briefed and treated the matter in such a way, and
as such, the Court will consider the Defendants to have "entered
the fray" and waived any objection on the issue of usury. For
that reason, the matter is ripe for decision here and in the
orders to follow.

1 The parties provided further briefing on the applicability
2 of this court's decision in *In re Arce Riverside LLC*, 538 B.R.
3 563 (Bankr. N.D. Cal. 2015) ("Arce") at the court's request.

4 For the reasons explained below, the court has determined
5 that as to the Moon MPSJ, the Moons should prevail on their
6 claims regarding usury and late fees but fail on their claim
7 regarding the acceleration penalty. As to the Defendant MSJ,
8 Milestone should prevail as to the first claim for declaratory
9 relief and the Moons' belated claim for interference with an
10 economic advantage. As to the breach of contract, intentional
11 interference with a contract, and fraud claims, disputes of
12 material fact remain to be resolved, and summary judgment must
13 be denied.

14 **IV. STANDARDS GOVERNING MOTIONS FOR SUMMARY JUDGMENT**

15 On a motion for summary judgment, the court must determine
16 whether, viewing the evidence in the light most favorable to the
17 nonmoving party, there are any genuine issues of material fact
18 as to any claim, part of claim, defense, or part of defense.

19 *Simo v. Union of Needletrades, Indus. & Textile Employees*, 322
20 F.3d 602, 609-10 (9th Cir. 2003); Fed. R. Civ. P. 56. Summary
21 judgment against a party is appropriate when the pleadings,
22 depositions, answers to interrogatories, and admissions on file,
23 together with the affidavits, if any, show that there is no
24 genuine issue as to any material fact and that the moving party
25 is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

26 Usury may be presented as either a claim or affirmative
27 defense under California law. See *Korchemny v. Piterman*, 68 Cal.
28 5th 1032 (2021).

1 **V. DISCUSSION**

2 **A. Usury Law and Exemptions**

3 The Moon MPSJ asserts that by virtue of the Extension,
4 Milestone charged interest in violation of the California usury
5 law. The California Constitution fixes the maximum annual
6 interest rate at 10% for "any loan or forbearance of any money,
7 goods, or things in action." Cal. Const. Art. XV § 1.
8 "The conscious and voluntary taking of more than the legal rate
9 of interest constitutes usury and the only intent necessary on
10 the part of the lender is to take the amount of interest which
11 he receives; if that amount is more than the law allows, the
12 offense is complete." *Ghirardo* at 798, quoting *Thomas v. Hunt*
13 *Mfg. Co.* 42 Cal. 2d 734, 740 (Cal. 1954). "The essential
14 elements of usury are: (1) The transaction **must be a loan or**
15 **forbearance**; (2) the interest to be paid must exceed the
16 statutory maximum; (3) the loan and interest must be absolutely
17 repayable by the borrower; and (4) the lender must have a
18 willful intent to enter into a usurious transaction." *Ghirardo*
19 at 798 (emphasis added). On its face, therefore, the Original
20 Loan violated the usury law unless an exemption saved it.

21 There are multiple exemptions to California's usury law,
22 including loans made by nationally chartered banks and certain
23 licensed businesses, Cal. Fin. Code § 22050, and pawnbrokers,
24 Cal. Bus. And Prof. Code § 21626. These and other exemptions
25 are not at issue here. The only exemption which is potentially
26 applicable is Cal. Civ. Code § 1916.1 ("§ 1916.1"), which deals
27 with loans or forbearances arranged by licensed real estate
28 brokers:

1 For the purposes of this section, a loan or
2 forbearance is arranged by a licensed real
3 estate broker when the broker:

4 (1) acts for compensation or in expectation of
5 compensation for soliciting, negotiating, or
6 arranging the loan for another,

7 (2) acts for compensation or in expectation of
8 compensation for selling, buying, leasing,
9 exchanging, or negotiating the sale, purchase,
10 lease, or exchange of real property or a
11 business for another **and**

12 (A) arranges a loan to pay all or any
13 portion of the purchase price of, or of
14 an improvement to, that property or
15 business or

16 (B) arranges a forbearance, extension, or
17 refinancing of any loan in connection
18 with that sale, purchase, lease, exchange
19 of, or an improvement to, real property
20 or a business, or

21 (3) arranges or negotiates for another a
22 forbearance, extension, or refinancing of any
23 loan secured by real property in connection
24 with a past transaction in which the broker
25 had acted for compensation or in expectation
of compensation for selling, buying, leasing,
exchanging, or negotiating the sale, purchase,

1 lease, or exchange of real property or a
2 business.

3 Cal. Civ. Code § 1916.1 (emphasis added). "A forbearance is
4 an agreement not to insist upon payment at the date of maturity
5 of a debt, or the giving of further time to pay." *Arce*, at 571,
6 citing *Buck v. Dahlgren*, 23 Cal. App. 3d 779, 785 (Cal. Ct. App.
7 1972). A forbearance can be agreed upon before the debt comes
8 due, *see, e.g., Jones v. Wells Fargo Bank*, 112 Cal. App. 4th
9 1527 (Cal. Ct. App. 2003) (forbearance arranged months prior to
10 Maturity Date of loan).

11 Here, the Extension modified the Original Loan in some
12 ways, including by extending the Maturity Date. It also lowered
13 the interest rate slightly, but not below the maximum permitted
14 by usury law if not eligible for an exemption. The Extension
15 must be considered a forbearance even if the parties neglected
16 to call it by its name.

17 "Note that there are only two instances of forbearance
18 mentioned [in § 1916.1]: in connection with a sale and in
19 connection with a past sale in which the broker acted as such."
20 *Arce*, 538 B.R. at 574. Neither applies here. The statute
21 "provides a restricted definition of the term "arranged" in
22 relation to a forbearance." *The Law of Usury*, Miller and Starr
23 California Real Estate 4th § 37:6. The statute painstakingly
24 sets forth the instances in which a forbearance negotiated by a
25 real estate broker would be exempt under usury law: when that
26 broker was previously involved in arranging the original loan
27 and that loan was in connection with a sale, lease, or other
28 transaction, or when that broker had previously arranged for the

1 sale, lease or other transaction for compensation.
2 § 1916.1(2)(B), (3). Conspicuously absent from those instances
3 is a scenario in which a forbearance is arranged on a simple
4 loan of money secured by real estate, with no other sale, lease,
5 or other transaction involved. This court cannot create an
6 exemption here to save Milestone.

7 Mr. Fournier, the licensed real estate broker involved in
8 the making of the initial loan, was not involved in the
9 Extension. While Milestone belatedly attempts to argue that
10 Carolyn Stuart, one of Milestone's owners, was a licensed broker
11 involved in the creation of the Extension, this assertion is
12 contradicted by Milestone's own prior documents, which show
13 absolutely no involvement by Ms. Stuart in the making of the
14 Extension. No licensed real estate broker was involved in the
15 making of the Extension. However, whether a real estate broker
16 (including Ms. Stuart) was involved in the making of the
17 Extension is ultimately an immaterial fact, because the
18 Extension is a forbearance of a type which falls outside of
19 California's carefully crafted usury exemptions.

20 i. **Ghirardo Involves a Credit Sale, Not a**
21 **Forbearance**

22 Milestone relies on *Ghirardo*⁶ for the proposition that the
23 Extension is neither a loan or forbearance and therefore outside
24 the bounds of usury law.

25
26 ⁶ Milestone also relies on *DCM Partners v. Smith*, 228 Cal. App.
27 3d 729, 278 Cal. Rptr. 778 (1991). *DCM* contains facts and
28 reasoning nearly identical to *Ghirardo*. Any analysis of
 Ghirardo here is equally applicable to *DCM*.

1 In *Ghirardo*, the defendant Antonioli⁷ purchased real
2 property in a seller-financed transaction (also known as a
3 credit sale) in which a promissory note was executed in favor of
4 the sellers. Antonioli then sold the property to another party,
5 who then sold the property to plaintiff Ghirardo via another
6 seller-financed transaction, in which Ghirardo would pay his
7 seller, and that seller would then pay Antonioli. A payment
8 dispute arose. Ghirardo and Antonioli came to a settlement
9 which cut out the middleman and increased the interest rate.
10 Later, Ghirardo sued Antonioli for charging a usurious interest
11 rate on the new note. The *Ghirardo* court explained the
12 negotiated promissory note fell outside usury law entirely,
13 because the original transaction was a credit sale, not a loan
14 or forbearance. In a credit sale, "the seller finances the
15 purchase of property by extending payments over time and
16 charging a higher price for carrying the financing. This type
17 of transaction . . . is not subject to the usury law because it
18 does not involve a loan or forbearance." *Ghirardo* at 803
19 (quoting *Southwest Concrete Products v. Gosh Construction Corp.*
20 51 Cal. 3d 701, 705 (Cal. 1990)). Ghirardo argued the modified
21 promissory note resulted in a forbearance. The court disagreed.
22 Simply put, a re-negotiated credit sale is still a credit sale.
23 It was not a loan.

24 Milestone likens the Extension to the type of settlement
25 found in *Ghirardo*: an agreement which is not a loan or
26

27 ⁷ The Defendants were a married couple, the Antoniolis. The
28 California Supreme Court referred to the Antoniolis in the
singular, so this Court does so as well.

1 forbearance and therefore falls outside of usury entirely.
2 However, the facts of this case are much closer to what this
3 court previously encountered in *Arce*, which involved a simple
4 loan secured by real estate, and a subsequent forbearance that
5 ran afoul of § 1916.1. For the reasons set forth above, the
6 Extension is likewise a forbearance. It was not the extension
7 of a credit sale and is thus not comparable to *Ghirardo*.
8 Milestone's assertion that the Extension is something other than
9 a forbearance is incorrect. The most critical element—a loan of
10 money followed by a forbearance—was what this was.

11 **ii. The Extension is Not Exempt Simply Because the**
12 **Original Loan was Exempt**

13 Milestone also relies on *Ghirardo* for the premise that an
14 originally non-usurious transaction cannot be transformed into a
15 usurious transaction at a later point. This again is a
16 misstatement of *Ghirardo*, which involved a type of transaction
17 that fell outside of usury because it was not a loan in the
18 first instance. No modification of that agreement could
19 transform the transaction into a loan or forbearance of a loan.

20 The reliance on *Ghirardo* is also an incorrect statement of
21 law, since non-usurious loans can be transformed into usurious
22 forbearances under certain circumstances. For instance, in
23 *Arce*, an originally non-usurious loan was transformed into a
24 usurious forbearance due to the increased interest rate and the
25 absence of any statutory exemption such as involvement of a
26 licensed real estate broker. Upon determining that the
27 modification was a forbearance, this court concluded that the
28 forbearance did not fall within the exemptions of § 1916.1.

1 Were that so, the increased interest would not have violated
2 usury law. Despite the anomalous result, this court reasoned
3 that the Legislature "knew what it was saying and meant what it
4 said" when it limited the real estate broker exemption to
5 forbearances only in very limited contexts. *Arce*, 538 B.R. at
6 674.

7 Here, the loan providing for interest above ten percent is
8 unlike *Ghirardo* (a credit transaction) or *Arce* (originally below
9 ten percent). The loan was not non-usurious, but rather a
10 usurious loan subject to an exemption. The difference between a
11 non-usurious loan and a loan subject to an exemption is slight
12 but distinct, and not just a matter of semantics. One is
13 outside of usury law entirely, and the other is within usury law
14 but subject to an exemption to that law. Once the exemption (no
15 real estate broker involved) ceased to apply, the exemption
16 disappeared, and the transaction became subject to the full
17 consequences of the usury law.

18 The California General Assembly enacted § 1916.1 on the
19 basis that "real estate brokers are qualified by the state on
20 the basis of education, experience, and examination, and that
21 the licenses of real estate brokers can be revoked or
22 suspended." Cal. Stats 1983 Ch. 307, Sec. 2. The legislature
23 was careful to only exempt those forbearances that were in
24 connection with sales, leases, or other exchanges of property.

25 The Extension does not fit within the exemption for
26 forbearances set forth in § 1916.1. A loan broker was not
27 involved in the making of the Extension, and even so, the
28 Extension was not in connection with a sale, lease, or other

1 type of exchange of property. It makes no difference that the
2 Extension slightly lowered the interest rate of the Original
3 Loan: the bright lines of § 1916.1 are clear. The law is
4 equally clear that it does not matter if a creditor intended to
5 stay within the usury exemption, and if the intent to loan a
6 usurious amount of interest exists without an exemption, then
7 the element of intent to commit usury has been met.

8 While the outcome may seem harsh, the court and the parties
9 must keep in mind that the goal of all usury law is to prevent
10 the making of usurious loans. Hard-money lenders have options
11 if they are not eligible for the protection of § 1916.1.
12 Milestone had the option to get licensed, lower the interest
13 rate, or foreclose on the property, however unappealing and
14 consequential that would have been to the Moons.

15 The Extension's interest rate and default interest rate
16 both violated California's usury law. Due to Milestone's
17 violation of usury law, Milestone is entitled only to the
18 principal balance of the Extension minus the amount of usurious
19 interest paid. See, e.g., *Westman v. Dye* 214 Cal. 2d, 31-38
20 (1931); *District Bond Co. v. Haley* (1935) 2 Cal. 2d 308, 311;
21 *Shirley v. Britt* 152 Cal. App. 2d 666, 670 (Cal. Ct. App. 1957);
22 *Korchemny v. Piterman*, 68 Cal. App. 5th 1032, 1043 (Cal. Ct.
23 App. 2021).

24 **B. The 10% Fee on the Balloon Payment**

25 Next, the Moons' MPSJ argues that the \$115,615.06 charge
26 associated with a 10% fee on the Moons' balloon payment,
27 initially called an "acceleration penalty" by Evergreen, was an
28 unlawful penalty. This penalty was not part of the Original

1 Loan but was inserted into the terms of the loan by the
2 Extension. Milestone contends the fee was a bargained-for and
3 reasonable estimated amount of liquidated damages.

4 Both parties frame the issue of whether the 10% fee on the
5 balloon is permissible in the context of liquidated damages.
6 Upon its previous finding of usury, the court must first
7 consider whether such the 10% fee should be deemed to be part
8 and parcel of the interest the court has found to be usurious.
9 The court concludes that the fee should be deemed separate from
10 the interest (and default interest) set forth in the Loan and
11 the Extension.

12 "Interest is the compensation allowed by law or fixed by
13 the parties for the use, forbearance, or detention of money."
14 Cal. Civ. Code § 1915. Liquidated damages are a pre-set measure
15 of damages agreed upon by parties to a contract "[t]o avoid
16 uncertainty and the cost of litigation if a breach occurs."
17 *Poseidon Development, Inc. v. Woodland Lane Estates, LLC*, 152
18 Cal. App. 4th 1106, 1115 (2007) (internal citations omitted).
19 The court concludes that the liquidated damages provision of the
20 Extension stands separately from the interest charged by the
21 Extension. Even if the loan were not deemed to be usurious, the
22 court would still need to determine whether the liquidated
23 damages provision, which is pegged solely to the principal
24 balance of the Extension, is permissible.

25 "A provision in a contract liquidating the damages for the
26 breach of the contract is valid unless the party seeking to
27 invalidate the provision establishes that the provision was
28

1 unreasonable under the circumstances existing at the time the
2 contract was made." *Id.*, quoting Cal. Civ. Code § 1671(b).

3 "A liquidated damages clause will generally be considered
4 unreasonable, and hence unenforceable under section 1671(b), if
5 it bears no reasonable relationship to the range of actual
6 damages that the parties could have anticipated would flow from
7 a breach." *Krechuniak v. Noorzoy*, 11 Cal. App. 5th 713, 722
8 (2017) (*citing Ridgley v. Topa Thrift & Loan Ass'n*, 17 Cal. 4th
9 970, 977 (1998)). Whether the damages are reasonable under
10 circumstances is a "question of law when the facts are
11 undisputed and susceptible of only one reasonable
12 interpretation." *Krechuniak* at 723.

13 In *Poseidon*, the parties executed a promissory note that
14 provided for interest-only monthly payments, and a final balloon
15 payment. The promissory note stated that because any late
16 payments would cause the lender to incur costs that would be
17 "difficult or otherwise impractical to assess," a 10% fee would
18 be imposed on every late-paid installment. The note was silent
19 as to whether this fee applied to the balloon payment when due.
20 The court found that even though a balloon payment may be
21 considered an "installment," the 10% fee as applied to the
22 balloon payment would be an unenforceable penalty under Cal.
23 Civ. Code § 1671(b).

24 The original Promissory Note was like *Poseidon*, providing
25 for late charges only on installment payments. The Extension,
26 drafted without a broker, modified the language to include a
27 late charge on top of the balloon payment.

1 While the language of the liquidated damages clause in both
2 the Promissory Note and in the Extension states that calculation
3 of damages is extremely difficult, that does not explain why a
4 new 10% charge on a hefty balloon payment would suddenly be
5 necessary to make Milestone whole in the event of default.
6 Milestone is fully able to calculate the unpaid principal it is
7 owed and the advances in taxes and insurance it made. Milestone
8 argues that the 10% fee also contemplates the lost points and
9 profit it would have made had it been able to re-lend the money
10 owed. This belated suggestion of damages does not account for
11 the 10% being chargeable whether the Moons were one day late or
12 many months late. *Dobson Bay Club IIDD, LLC v. La Sonrisa de*
13 *Diena, LLC*, 242 Ariz. 108 (Ariz. 2017) (finding a 5% fee on a
14 loan's balloon payment to be an unenforceable penalty).

15 Accordingly, the \$115,615.06 is an illegal penalty under
16 Cal. Civ. Code § 1671(b).⁸

17 **C. Multiple Late Charges**

18 The Moon MPSJ alleges that Milestone violated Cal. Civ.
19 Code § 2954.4, which addresses "late payment charges on real
20 estate loans encumbering single-family owner-occupied
21 dwellings." This law provides that "[a] charge may not be
22 imposed more than once for the late payment of the same
23 installment. . . For the purposes of determining whether late
24 charges may be imposed, any payment tendered by the borrower
25 shall be applied by the lender to the most recent installment

26 ⁸ The court also presumes, but need not decide, that the fee on
27 the balloon is also an illegal usury amount, similar to the
28 "bonus" that was disallowed as usurious in *Jones v. Dickerman*,
114 Cal. App. 357 (1931).

1 due." Cal. Civ. Code § 2954.4(a)-(b). Loans arranged by a
2 licensed real estate broker are exempt from this law. Sec.
3 2954.4(e).

4 Milestone does not dispute that its late fee practices
5 would contravene § 2954.4, if not for the exemption provision of
6 subsection (e). Unlike § 1916.1, § 2954.4 does not provide for
7 specific instances in which forbearances must be treated
8 differently.

9 Thus, because the Original Loan undisputedly involved a
10 real estate broker, § 2954.4 does not apply to the late fees
11 charged on either the Original Loan or the Extension.

12 The court agrees with Milestone's assessment. Even the
13 Moons' Reply (Dkt. 61) indicates agreement with Milestone and
14 states that "[t]here is only one loan in this case, the June
15 2015 \$795,000 loan that is secured by the 2015 Deed of Trust.
16 The September 2016 document by its terms, is an extension of
17 that June 2015 loan. There is only one loan and all the
18 payments by the Moons are covered by § 2954.4." (Dkt. 61 at 13).

19 There is no factual dispute here. Both parties agree that
20 the Original Loan brokered by Mr. Fournier controls.

21 Accordingly, the court concludes as a matter of law that
22 the late fee exemption of § 2954.4(e) applies to the Extension.
23 Milestone is entitled to recover its unpaid late charges.

24 **D. Declaratory Relief**

25 A party to a contract may seek declaratory relief in a
26 California state court to determine each party's rights and
27 obligations under a contract. Cal. Code Civ. Proc. § 1060. This
28 relief is sought by the Moons in the Amended Complaint. Such

1 relief is too generalized when applied to the facts presented,
2 and the types of rights and obligations which each party seeks
3 to clarify are addressed by the rest of this decision. The
4 Moons are not entitled to any recovery on their First Count of
5 the Amended Complaint, and Milestone is entitled to partial
6 judgment on that claim.

7 **E. Breach of Contract**

8 “A breach of contract is the wrongful, i.e., the
9 unjustified or unexcused, failure to perform the terms of a
10 contract.” *Chen v. Paypal, Inc.*, 61 Cal. App.5th 559, 570
11 (2021). The Amended Complaint alleges that Milestone breached
12 its contract with the Moons “by demanding a payoff amount far in
13 excess of the amount required by any contract, and demanding
14 amounts that were illegal under the law” (Dkt 1-7, pg. 6).

15 The Extension entered by the Plaintiffs released any and
16 all claims in existence prior to September 1, 2016. Any breach
17 of contract relating to acts by Milestone prior to the Extension
18 has been waived.

19 It is an as-yet unanswered question whether the payoff
20 requested in 2019 was indeed in excess of what was owed by the
21 Moons. Because the true amount of the payoff is unknown, and it
22 is a factual question as to whether an incorrect payoff
23 statement amounts to a breach on the part of Milestone, the
24 court will deny the Defendant MSJ on that portion of the Second
25 Count of the Amended Complaint.

26 **F. Fraud**

27 The elements of fraud are: (1) a misrepresentation (false
28 representation, concealment, or nondisclosure); (2) knowledge of

1 falsity (or scienter); (3) intent to defraud, i.e., to induce
2 reliance; (4) justifiable reliance; and (5) resulting damage.
3 *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th 979
4 (2004). The Moons allege Defendants committed fraud by inducing
5 them to enter an Extension which represented more money than
6 what the Moons owed to Milestone at the time and resulted in a
7 too-high payoff amount in 2019. As stated above, the Moons
8 knowingly released all claims related to actions taken by
9 Defendants prior to September 1, 2016. However, the same
10 material fact issue related to the breach of contract claim also
11 remains for the fraud claim: whether in 2019 Milestone knowingly
12 issued a false payoff amount to the Moons, and whether the Moons
13 knew of or relied on the falsity of the payoff amount. The court
14 will deny the Defendant MSJ on the Third Count of the Amended
15 Complaint.

16 **G. Intentional Interference with a Contract**

17 The elements of intentional interference with contract are
18 " (1) a valid contract between the plaintiff and a third party,
19 (2) the defendant's knowledge of that contract, (3) the
20 defendant's intentional acts designed to induce a breach or
21 disruption of the contractual relationship, (4) actual breach or
22 disruption of the contractual relationship, and (5) resulting
23 damage." *Reeves v. Hanlon*, 33 Cal. 4th 1140 (2004).

24 The Moons have made a showing that there is a factual
25 dispute as to whether there was a valid contract between the
26 Moons and the third party with which the Moons were seeking to
27 refinance, and that production of such a contract is plausible.
28 Because a material fact regarding the claim is in dispute, the

1 court will deny the Defendant MSJ on the Fourth Count of the
2 Amended Complaint.

3 **H. Intentional Interference with an Economic Advantage**

4 The Moons attempted belatedly to insert an additional claim
5 for Interference with an Economic Advantage in their Opposition
6 to the Defendant MSJ (Dkt. 49) in case the court finds there is
7 merely a non-binding intention to enter into a contract.
8 Because such a claim was not plead in the Amended Complaint, or
9 even the Moon MPSJ, the Moons cannot prevail and must move
10 forward only on their initially plead claim for Intentional
11 Interference with a Contract. Milestone is entitled to partial
12 summary judgment on that unnumbered claim.

13 **VI. DISPOSITION**

14 For the foregoing reasons:

15 A. The Moon MPSJ will be GRANTED on the usury claim and on
16 the claim regarding the 10% acceleration charge on the
17 balloon payment; in all other respects it will be
18 DENIED. What the Moons have paid in interest will be
19 credited to the principal and all accrued interest, at
20 least as of the Maturity Date of the Extension, will be
21 eliminated.

22 B. Because of the usury savings clause and the unique
23 history of this case and the conduct of the parties, the
24 court will not consider punitive or other damages.

25 C. After further briefing and argument, or consent by the
26 parties, the court will determine what Milestone is
27 entitled to by way of reimbursement of taxes, insurance
28 and other advances or costs. This would result in

amount owing as of the July 31, 2019 Maturity Date of \$902,52.34 MINUS interest actually paid through July 31, 2019, PLUS insurance, taxes and other costs advanced by Milestone.

D. After further briefing and argument, or consent by the parties, the court will determine the amount, if any, of interest accrued and owing after the Maturity Date of the Extension.

E. The Milestone MSJ will be GRANTED, in part, on the claim for late charges and on the First Count of the Amended Complaint.

F. The Milestone MSJ will be DENIED as to the Second, Third, and Fourth Claims of the Amended Complaint.

G. After further briefing and argument, or consent by the parties, the court will issue orders consistent with the foregoing.

END OF MEMORANDUM DECISION

1 COURT SERVICE LIST

2 ECF Recipients

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